AHMAD ZAHRI MIRZA v. PRICEWATERHOUSECOOPERS CAPITAL SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: 24NCVC-281-02-2014]
31 JULY 2015

CIVIL PROCEDURE: *Discovery – Pre-action – Pre-action discovery against non-parties to an intended action – Rules governing discovery – Scope of O. 24 r. 7A Rules of Court 2012 ('ROC') – Whether pre-action discovery under O. 24 r. 7A of ROC only confined to parties likely to be a party to an intended action – Whether applicant must show defendants likely to be a party to an intended action – Whether saving of costs ought to be a factor in favour of allowing a pre-action discovery*

CIVIL PROCEDURE: *Discovery – Relevancy of documents – Application to produce valuation report to ascertain actual purchase price per share sold – Valuation report prepared for public purpose – Whether documents sought in pre-action discovery necessary in assessment of plaintiff's claim – Whether application frivolous, speculative and intended for fishing expedition – Whether documents sought in pre-action discovery necessary to fill void and gaps in plaintiff's knowledge of his claim – Whether disclosure of valuation report would cause embarrassment and prejudice to defendants*

The plaintiff had some investment of 80,000 shares in a company called AIMS Data Centre 2 Sdn Bhd ('AIMS 2'). Due to a restructuring exercise, the plaintiff had agreed to dispose of his shares in AIMS 2 to Megawisra Sdn Bhd ('Megawisra') and the latter had agreed to flog off the whole block of shares in AIMS 2 and in other companies of AIMS Group of Companies ('AIMS Group') to third party. Subsequently, on 3 November 2010, the plaintiff and Megawisra had entered into a share sale agreement wherein the formula for calculation of price per share was stated under cl. 4(ii) of the share sale agreement. At the material time, the third defendant ('D3'), a public listed company, had planned for acquisition of AIMS Group of which AIMS 2 was one of them. For purpose of the said acquisition and in line with the Bursa Malaysia Listing Requirements, an independent valuation was required to be prepared. The valuation was to arrive at a fair market value of the companies in AIMS Group and for that purpose the first defendant ('D1') was appointed by D3. The second defendant ('D2') was appointed as an independent adviser to provide advice to non-interested directors and shareholders of D3 in respect of the proposed acquisition by D3. Premised on the independent valuation of D1 in respect of the AIMS Group, D3 and Megawisra had agreed that the proposed acquisition of the AIMS Group to be for the purchase consideration of RM119,000,000. Having received the full purchase price from D3, Megawisra became uncooperative with the plaintiff on a full and frank disclosure as to the purchase price per share that could be ascertained for the sale of the whole of the shares of AIMS 2 to D3.

A Dissatisfied with Megawisra's reaction, the plaintiff then decided to commence an action against Megawisra for payment of the balance purchase price due to him under the share sale agreement and damages for breach of contract. However, the plaintiff had difficulties is ascertaining the actual purchase price per share in calculating the total purchase price due to him
B for the disposal of his shares in AIMS 2 to Megawisra. In order for the plaintiff to frame his claim against Megawisra, the plaintiff had filed this action against the defendants for discovery, inspection and taking copies of valuation report prepared for the acquisition and the supporting documents and/or working papers relied upon, referred to or used by the defendants in
C respect of the acquisition. The main issues that arose for the court's determination were (i) whether pre-action discovery in O. 24 r. 7A of the Rules of Court 2012 ('ROC') was only confined to parties likely to be a party to an intended action; and (ii) whether the documents sought in the pre-action discovery were necessary in that it would help the plaintiff to assess if he had a viable claim against Megawisra and to fill the void and gaps in the
D plaintiff's knowledge of his claim.

Held (allowing plaintiff's claim against D3 with costs; dismissing plaintiff's claim against D1 and D2 with costs):

(1) Where the rules do not prohibit a pre-action discovery against a
E non-party to an intended action but rather permit it in circumstances that justify it, it would be an unfortunate misreading of the rules to say that it must be shown that the defendants are likely to be a party to an intended action, or otherwise no order may be given against a third party not intended to be a party to an action that may follow the discovery
F order. (para 28)

(2) The clause '... whether the person against whom the order is sought is likely to be a party to subsequent proceedings in court;' in O. 24 r. 7A(3)(a) itself gives the plaintiff an option to state if the person against whom a pre-action discovery order is sought is likely or unlikely or even
G not intended at all to be a party to an action that may be filed subsequent to the discovery order. To read otherwise would be to totally denude and deplete it of meaning in a myriad of situations where the third party against whom discovery is sought is not intended to be a party to subsequent proceedings in court. (para 28)

H **(3)** Where the plaintiff knows there is an amount due to him and yet at the same time not being able to know how much and hence not being able to reasonably accept or reject the sum proposed by Megawisra, in all fairness to the plaintiff, he should be allowed discovery of the valuation report of the AIMS Group as may be in possession of the defendants.
I The justification becomes even more compelling when Megawisra had already, for all intents and purposes, received the full consideration bargained for from D3. (para 31)

(4) There was no doubt that if the letter of valuation as disclosed in D3's circular to shareholders as exhibited by the plaintiff in his affidavit in support contained the valuation of the AIMS Group of Companies as a whole, then the full valuation report would disclose the valuation of each of the companies in the AIMS Group of which AIMS 2 was one. Having known how much was AIMS 2 valued as a whole, one would then be able to determine the price per share and apply to formula in cl. 4(ii) of the share sale agreement to determine the purchase price. If indeed, having such void and gaps filled, it was discovered that the purchase price was equivalent to the sum as valued by the collector of stamp duty in valuing the shares, then there would be no need to commence an action against Megawisra for breach of the share sale agreement but to settle with Megawisra. The saving of costs was factor in favour of allowing a pre-action discovery even against a third party not intended to be a defendant in a suit to be commenced as provided for in O. 24 r. 8 ROC. (paras 46 & 47)

(5) The pre-action discovery of the valuation report could not be frivolous or speculative as the document sought was the basis of an independent valuation of AIMS Group of which AIMS 2 was a part. The very nature of the document and the very purpose for which the valuation report was prepared, which was to provide an independent valuation of the target company that the D3, a public listed company intended to acquire, militates against any shield of secrecy and cover of confidentiality. The valuation report was prepared, every bit, for a public purpose and there was nothing private about it. Moreover disclosing it would in no way inconvenient anyone, or cause embarrassment or prejudice to D1 and D3. (paras 52 & 54)

Case(s) referred to:

Bayerische Hypo-Und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications [2004] SGHC 155 ***(refd)***

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v. Chan Kim Swi (Capital Insurance Bhd, Garnishee) [1996] 1 LNS 112 HC ***(refd)***

Ching Mun Fong v. Standard Chartered Bank [2012] 4 SLR 185 CA ***(refd)***

Compaignee Financiere du Pacifique v. Peruvian Guano Co [1882] 11 QBD 55 ***(refd)***

Dorsey James Michael v. World Sport Group Pte Ltd [2014] 2 SLR 208 CA ***(refd)***

Dunning v. Liverpool Hospitals Board [1973] 2 All ER 454 ***(refd)***

Kuah Kok Kim & Ors v. Ernst & Young [1996] 3 SLR 485 CA ***(refd)***

Ng Giok Oh and others v. Sajjad Akhtar and others [2003] 1 SLR 375 ***(refd)***

Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd [2008] 6 CLJ 149 CA ***(refd)***

Syarikat Chin Seng Supermarket v. United Continental Insurance Sdn Bhd [1996] 1 LNS 10 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 24 rr. 7A, 8

Rules of Court (Cap 322, R 5, 2004 Rev Ed) [Sing], O. 24 r. 6

Other source(s) referred to:
Malaysian Rules of Court 2012, An Annotation, vol 1, 24/7A/1, p 517

For the plaintiff - C K Yeoh (John Wong with him); M/s Azim, Tunku Farik & Wong
For the 1st defendant - Leong Wai Hong (David Tan with him); M/s Skrine
For the 2nd defendant - Samuel Tan Lih Yau; M/s Shook Lin & Bok
For the 3rd defendant - Izzat Ashraff Zamri; M/s Kadir & Partners

Reported by Thirunavakarasu Vijayan

JUDGMENT

Lee Swee Seng J:

[1] Pre-trial discovery is common between parties to an action that has already begun. It is less usual if the discovery is before the commencement of proceedings. It is even more rare still if the discovery is pre-action against non-parties to an intended action. The case of *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] AC 133, was the watershed setting out the circumstances under which a pre-action discovery application may be made confining itself mainly to situations where it would be nigh impossible to commence an action against unknown defendants; unknown to the plaintiff but known to the party against whom a pre-action discovery is sought. As was observed by the Court of Appeal in *Nishimatsu Construction Co Ltd v. Kecom Sdn Bhd* [2008] 6 CLJ 149; [2009] 2 MLJ 404 at p. 407:

> Save in the circumstances set out in the decision of the House of Lords in *Norwich Pharmacal Co v. Customs and Excise Commissioners* [1974] AC 133, the court has no jurisdiction to grant anticipatory discovery that is to say discovery in anticipation of the action being filed.

[2] The circumstances under which such an order may be made have since expanded to cover a variety of situations where it would be just and necessary even when the defendants have been identified, with a view to saving costs or assessing the viability of one's case. It is generally understood that the new O. 24 r. 7A Rules of Court 2012 ("ROC") was deliberately designed to cater to the new regime introduced by the Norwich Pharmacal order and indeed to codify the principles enunciated in the *Norwich Phamacal*'s case.

[3] There was of course no necessity to reinvent the wheels. Similar provisions have appeared in the UK Civil Procedure Rules. Singapore in revamping their Rules of Supreme Court has their O. 24 r. 6 Rules of Court (Cap 322, R 5, 2004 Rev Ed).

[4] This judgment explores the scope of O. 24 r. 7A ROC with respect to pre-action discovery against non-parties to an intended action by a plaintiff.

Problem

[5] The plaintiff had some investments in a company called AIMS Data Centre 2 Sdn Bhd ("AIMS 2"). He had 80,000 shares in AIMS 2 which worked out to be 40% of the total paid up capital of AIMS 2. He was also

the former Vice President of Business Development of AIMS 2, playing an executive role in the company. Another party Megawisra Sdn Bhd ("Megawisra") had 51% of the total paid up capital. The balance 4% was in the hands of four other shareholders. The plaintiff was agreeable to dispose of his shares in AIMS 2 to Megawisra as part of the latter's restructuring exercise such that with the other shareholders also transferring their shares to Megawisra, Megawisra may then flog off the whole block of shares in the AIMS 2 and in the other companies in the Group (called AIMS Group) to a third party in a corporate exercise.

[6] As a sweetener, the purchase price to be paid by Megawisra to the plaintiff was expressed as follows in cl. 4(ii) of the share sale agreement of 3 November 2010:

> In the event that Megawisra dispose of all of its shareholding in ADC2 pursuant to a trade sale, IPO or otherwise, such net purchase consideration received per share, multiplied by 80,000 minus the EBIDTA Payment ("Future Payment") will be paid to you on the following terms:
>
> (a) in three (3) equal annual instalments, commencing in the calendar year following the completion of the disposal of ADC2 shares and payable on the 31st day of January of each year ("Payment Dates") and ...

[7] ADC2 is the acronym for AIMS Data Centre 2 Sdn Bhd in the share sale agreement also abbreviated as AIMS 2 in this judgment.

[8] The consideration paid upon signing the share sale agreement was just a mere RM1 only.

[9] Both parties would of course stand to gain in the sale. It was a win-win situation with both poised and positioned for a decent return on their investments. The buyer was found in the third defendant herein, Time Dotcom Berhad ("D3"). Being a public listed company, the purchase must be transparent and for a fair price and in line with the Bursa Malaysia Listing Requirements ("Bursa LR") an independent valuation had to be prepared and its valuation letter circulated to the shareholders as part of the circular to shareholders for an Extraordinary Annual General Meeting ("EGM") to be called by D3 for its shareholders to approve the acquisition. The valuation was to arrive at a fair market value of the companies in the AIMS Group (of which AIMS 2 was one of them) so as to fix a fair purchase consideration for the shareholders to be comfortable to vote on. For this purpose, the first defendant ("D1") was appointed by D3 on 15 December 2010 to prepare the valuation letter.

[10] In line with the Bursa LR, the second defendant ("D2") was appointed as an independent adviser on 15 November 2010 to provide advice to the non-interested directors and shareholders of D3 in respect of the proposed acquisition by D3. This was necessary as Megawisra together with one Mr Gan and Mr Afzal, both as directors of Megawisra, before the

A acquisition, held indirectly 30.40% of the shares of D3, making the transaction a related-party transaction and safeguards must be in place for the protection of the non-interested shareholders. Further, Mr Gan was at the material time a director of D3 and Mr Afzal the CEO of D3.

B **[11]** Premised on the independent valuation of D1 in respect of the AIMS Group, D3 and Megawisra agreed that the proposed acquisition of the AIMS Group would be for a purchase consideration of RM119,000,000 to be fully settled by the issuance of 20,112,676 new D3's shares at an issue price of RM3.55 each and a cash payment of RM47,600,000. The valuation done by D1 was set out in appendix X of the circular to shareholders. The AIMS C Group was valued to be in the region of RM106-120 million.

[12] D3, in compliance with Bursa LR, duly made the announcement through Bursa Malaysia on 30 May 2012 of the said acquisition, its purchase consideration and the mode of payment of the purchase consideration.

D **[13]** Having parted with the whole of its shares in AIMS 2 to Megawisra and Megawisra having received its full purchase price from D3, the plaintiff was naturally looking forward to receive its share of the purchase price. Alas, Megawisra was not cooperative much less candid with the plaintiff, on a full and frank disclosure as to the purchase price per share that could be E ascertained for the sale of the whole of the shares of AIMS 2 to D3. The valuation letter had contained the valuation of the whole of the shares in the AIMS Group of which AIMS 2 was one.

[14] The plaintiff wrote, through their solicitors Messrs Azim Tunku Farik & Wong, to Megawisra for a copy of the valuation report which they believe F would contain the breakdown of the valuation of the shares of each of the company within the AIMS Group. Megawisra's solicitors Messrs Sedgley & Co, in their reply declined to provide the valuation report or the valuation of AIMS 2 and instead, told the plaintiff to make the request directly to D3.

Prayers

G **[15]** The plaintiff was constrained, if not compelled, to make this pre-action discovery application *via* this originating summons ("OS"). In brief, the plaintiff is seeking for the discovery, inspection and taking copies of the following documents from all the defendants, namely the valuation report prepared for the acquisition, including without limitation, the valuation of H each entity under the AIMS Group (which included AIMS 2) and the supporting documents and/or working papers relied upon, referred to or used by the defendants in respect of the acquisition.

[16] The various prayers in the amended OS (encl. 6) against each of the three defendants are set out below: I

(i) D1 do within eight days from the date of this order make an affidavit stating whether the following documents were at any time been in its possession, custody, or power, and if the same are no longer in its

possession, custody, or power, stating when it parted with the same and what has become of them and that there be inspection of the documents which are still in D1's possession, custody or power within ten days thereafter and the plaintiff be entitled to take copies of the said documents:

(a) the valuation report of the AIMS Data Centre 2 Sdn Bhd ("AIMS 2"), the AIMS Asia Group Sdn Bhd and its subsidiaries and AIMS Cyberjaya Sdn Bhd ("the AIMS Group") prepared for the purpose of *inter alia* the acquisition of 100% equity stakes in the AIMS Group from Megawisra Sdn Bhd by Time Dotcom Berhad ("the acquisition");

(b) the valuation and/or the indicative value of each entity under the AIMS Group, in particular AIMS 2; and

(c) the supporting documents and/or working papers relied upon, referred to or used by D1 for the purpose in which D1 was retained, namely to obtain *inter alia* the fair market value of the AIMS Group in respect of the acquisition; and

(ii) D2 do within eight days from the date of this order make an affidavit stating whether the following documents were at any time been in its possession, custody, or power, and if the same are no longer in its possession, custody, or power, stating when it parted with the same and what has become of them and that there be inspection of the documents which are still in D2's possession, custody or power within ten days thereafter and the plaintiff be entitled to take copies of the said documents:

(a) the valuation report prepared for the acquisition, including without limitation, the valuation of each entity under AIMS Group, in particular AIMS 2, the supporting documents and/or working papers relied upon, referred to or used by D1 and/or D2 in respect of the acquisition; and

(iii) D3 do within eight days from the date of this order make an affidavit stating whether the following documents were at any time been in its possession, custody, or power and if the same are no longer in its possession, custody, or power, and if the same are no longer in its possession, custody, or power, stating when it parted with the same and what has become of them and that there be inspection of the documents which are still in D3's possession, custody or power within then ten days thereafter and the plaintiff be entitled to take copies of the said documents:

(a) the valuation report prepared for the acquisition, including without limitation, the valuation of each entity under the AIMS Group, in particular AIMS 2, the supporting documents and/or working papers relied upon, referred to or used by D1 and/or D2 and/or D3 in respect of the acquisition;

(iv) the costs of this application to be costs in the cause; and

(v) further and other orders as this Honourable Court deems just and necessary.

Preliminaries

[17] Order 24 r. 7A ROC was absent in the previous Rules of the High Court 1980. It was introduced by the revamped ROC 2012. It is almost word for word the same as O. 24 r. 7A of the then Singapore Rules of the Supreme Court (Cap 322, R 5, 1990 Ed) ("the RSC") except that for the mode of an application after the commencement of proceedings, it is to be made by way of "summons" in the Singapore RSC in O. 24 r. 7A(2) whereas that under our O. 24 r. 7A(2) ROC the mode shall be by way of a "notice of application". A further difference is the word "or" in the Singapore RSC between its O. 24 r. 7A(3)(a) and O. 24 r. 7A(3)(b) whereas the word "and" is used in our case. The disagreement as to whether "or" is conjunctive or disjunctive was resolved in Singapore in the Court of Appeal case of *Kuah Kok Kim and others v. Ernst & Young* [1996] 3 SLR 485 at p. 492 with the Court of Appeal of Singapore resolving it in favour of the conjunctive "and" such that the two paragraphs must be construed conjunctively and not disjunctively.

[18] The Court of Appeal of Singapore in *Kuah Kok Kim*'s case (*supra*) at p. 489 was candid in observing that O. 24 r. 7A of the Singapore RSC appears to have its origin from the UK save that the equivalent English provision is limited to personal injury claims only and does not include the word "or" between r. 7A(3)(a) and r. 7A(3)(b).

[19] The Singapore RSC has since been repealed and replaced with the Rules of Court (Cap 322, R 5, 2004 Rev Ed) ("the RC (Sing)") in O. 24 r. 6. Our O. 24 r. 7A is in *pari materia* with O. 24 r. 6 of the Singapore Rules. I agree with learned counsel for the plaintiff, Mr CK Yeoh, that Singapore authorities on this point would be highly persuasive in our interpretation of our new O. 24 r. 7A ROC.

[20] Our O. 24 r. 7A ROC is reproduced below:

> Discovery against other person (O. 24 r. 7A)
>
> 7A. (1) An application for an order for the discovery of documents before the commencement of proceedings shall be made by originating summons and the person against whom the order is sought shall be made defendant to the originating summons.
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> (2) An application after the commencement of proceedings for an order for the discovery of documents by a person who is not a party to the proceedings shall be made by a notice of application, which shall be served on that person personally and on every party to the proceedings.

(3) An originating summons under paragraph (1) or a notice application under paragraph (2) shall be supported by an affidavit which shall:

(a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the intended proceedings and whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court; and

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise out of the claim made in the proceedings or the identity of the likely parties to the proceedings, or both, and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(4) A copy of the supporting affidavit shall be served with the originating summons or the notice of application on every person on whom the originating summons or the notice of application is required to be served.

(5) An order for the discovery of documents before the commencement of proceedings or for the discovery of documents by a person who is not a party to the proceedings may be made by the Court for the purpose of or with a view to identifying possible parties to any proceedings in such circumstances where the Court thinks it just to make such an order, and on such terms as it thinks just.

(6) An order for the discovery of documents may:

(a) be made conditional on the applicant giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just; and

(b) require the person against whom the order is made to make an affidavit stating whether the documents specified or described in the order are, or at any time have been, in his possession, custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.

(7) A person shall not be compelled by such an order to produce any document which he could not be compelled to produce:

(a) in the case of an originating summons under paragraph (1), if the subsequent proceedings had already been commenced; or

(b) in the case of a notice of application under paragraph (2), if he had been served with a subpoena to produce documents at the trial.

A (8) For the purposes of rules 10 and 11, an application for an order under this rule shall be treated as a cause or matter between the applicant and the person against whom the order is sought.

(9) Unless the Court orders otherwise, where an application is made in accordance with this rule for an order, the person against whom B the order is sought shall be entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis.

[21] Further O. 24 r. 8 ROC reads as follows:

Discovery to be ordered only if necessary (O. 24 r. 8)

C 8. On the hearing of an application for an order under rule 3, 7 or 7a, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not D necessary either for disposing fairly of the cause or matter or for saving costs.

[22] In our Malaysian Rules of Court 2012, An Annotation, it was observed that "The present rule is similar in all material respect with RC (Sing) O. 24 r. 6 with the exception to method of application which is by E summons in the RC (Sing) but by notice of application in this rule. The words in r. 7A(5) now give statutory effect to the Norwich Phamarcal order". (*Malaysian Rules of Court 2012, An Annotation*, vol. 1, 24/7A/1, p. 517)

Principles

F *Whether The Pre-action Discovery In O. 24 R. 7a ROC Is Only Confined To Parties Likely To Be A Party To An Intended Action*

[23] Learned counsel for D1, Mr Leong Wai Hong, submitted that the plaintiff is not entitled to discovery against D1 since the plaintiff had not shown that D1 is likely to be a party to the intended proceedings against G Megawisra. Thus, he concluded that the plaintiff had failed to comply with O. 24 r. 7A(3)(a) ROC.

[24] That, with respect, is a misreading of the mischieve that O. 24 r. 7A ROC was intended to overcome and misses the mark altogether. It is not only regressive but also repulsive of the clear language used. All that it says is as H follows:

(3) An originating summons under paragraph (1) or a notice application under paragraph (2) shall be supported by an affidavit which shall:

(a) in the case of an originating summons under paragraph (1), state the grounds for the application, the material facts pertaining to the I intended proceedings and **whether the person against whom the order is sought is likely to be party to subsequent proceedings in Court**; (emphasis added)

[25] The plaintiff had stated clearly and categorically that D1 is not an intended to be a party to subsequent proceedings in court. In fact, none of the defendants in this OS are intended to be a party to any subsequent proceedings to be filed. The plaintiff further stated that the discovery sought against the Ds is necessary so that he may be able to proceed to frame his claim for breach of contract to recover the balance purchase price due to him and damages for breach of the contract of sale of his shares in AIMS 2 to Megawisra. The intended defendant is Megawisra and not any of the Ds in this OS.

[26] All that is required in the affidavit in support is to state whether the Ds in the OS are likely parties to the proceedings to be commenced after the discovery application. No where is it stated that if proceedings are not intended against the party on whom the discovery is sought, then the discovery must be refused.

[27] The rationale is not difficult to find. If discovery is sought against non-parties as opposed to parties to an intended proceeding, then the court would be stricter in scrutinizing the reasons given for the need so as not to unnecessarily inconvenient much less to harass third parties not involved in any dispute with the plaintiff seeking a pre-action discovery order. Likewise, if the party against whom discovery is sought is likely to be a defendant in the intended proceedings, then the court would be able to scrutinize the reasons given for the need with respect also to how likely would the party be a necessary party to the intended proceedings. It is then that one turn to the case of *Dunning v. Liverpool Hospitals Board* [1973] 2 All ER 454 at p. 457 where the test given is as follows:

> That section refers to the rules of court. They are contained in RSC Ord. 24, r. 7A and r. 8, which prescribe the procedure, but do not help in the interpretation.
>
> Applying the section it seems to me reasonably plain (1) that Mrs Dunning is 'likely to be a party' if the proceedings were started; she is likely to be plaintiff, (2) that the hospital board are persons who are 'likely to be a party to the proceedings' if 'subsequent proceedings in which a claim in respect of personal injuries … is likely to be made'. Much turns on the meaning of the words 'likely to be', If a claim is 'likely to be made' the hospital board are 'likely to be a party'. They are likely to be defendants. (3) They have relevant documents in their possession.
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> So the one question is this: is a claim in respect of personal injuries 'likely to be made' in subsequent proceedings?
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> To that question the answer is: it all depends on what is contained in the medical reports and case notes. If they contain information pointing to negligence on behalf of the hospital board, then a claim is 'likely to be made': but if not, then a claim is not likely. If the information does point to negligence, Mrs Dunning will, no doubt, get an extension of time

A under the 1963 Act, because she will not have known that she had a worthwhile cause of action until she got the medical reports and case notes.

So the likelihood of a claim depends on the outcome of the discovery. It depends on what Dr Evans finds in the medical reports and case notes. How do you apply the section to this situation? It is difficult, but I think that we should construe 'likely to be made' as meaning 'may' or 'may well be made' dependent on the outcome of the discovery. One of the objects of the section is to enable a plaintiff to find out - before he starts proceedings - whether he has a good cause of action or not. This object would be defeated if he had to show - in advance - that he had already got a good cause of action before he saw the documents.

In support of this view, I think it is permissible to look at the Report of the Committee on Personal Injuries Litigation in 1968 which was presided over by Winn LJ. It shows the mischief aimed at. It says:

> Accordingly we regard it as essential that, whether or not any action has been commenced, provision should be made, if necessary by originating summons by either party, for ensuring the availability at the time of any medical examination of all such hospital records and all such entries in the summary of attendances by a general practitioner required to be kept by him under the National Health Act.

[28] Where the rules do not prohibit a pre-action discovery against a non-party to an intended action but rather permit it in circumstances that justify it, it would be an unfortunate misreading of the rules to say that it must be shown that the Ds are likely to be a party to an intended action, or otherwise no order may be given against a third party not intended to be a party to an action that may follow the discovery order. The clause "... whether the person against whom the order is sought is likely to be party to subsequent proceedings in court;" in O. 24 r. 7A(3)(a) itself gives the plaintiff an option to state if the person against whom a pre-action discovery order is sought is likely or unlikely or even not intended at all to be a party to an action that may be filed subsequent to the discovery order. To read otherwise would be to totally denude and deplete it of meaning in a myriad of situations where the third party against whom discovery is sought is not intended to be a party to subsequent proceedings in court.

[29] It must not be forgotten that in *Norwich Pharmacal*'s case (*supra*), the appellants at the House of Lords, had conceded that they did not have a cause of action against the respondent, the Custom and Excise Commissioners. In other words, the pre-action discovery was sought against a party not intended to be a defendant in an intended action by the appellants for breach of their patent. The House of Lords allowed the appellants' appeal and granted the pre-action discovery order. It would be a regressive step to now state that O. 24 r. 7A ROC which was intended to give a statutory footing to the principles of discovery against third parties in *Norwich Pharmacal*'s case

(*supra*) should now be restricted to parties intended only to be sued as a defendant. Both on rationale and the clear wording of the rules, such a proposition cannot be sustained.

Whether The Documents Sought In The Pre-action Discovery Are Relevant To An Issue Arising Or Likely To Arise Out Of The Claim To Be Made In The Proceedings

[30] Substantively for the plaintiff to succeed, he must be able to show that the documents sought from the defendants are relevant to an issue likely to arise out of the claim to be made. See O. 24 r. 7A(3)(b) ROC.

[31] The classic authority, on the test for relevance in the context of discovery is the case of *Compaignee Financiere du Pacifique v. Peruvian Guano Co* [1882] 11 QBD 55 where Brett LJ said this at p. 63:

> It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly", because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences …

[32] The plaintiff had no problem stating that his cause of action against Megawisra is for payment of the balance purchase price due to him under the contract for sale of his shares and damages arising out of the breach. However, he could not even begin to make a proper demand as he does not know the purchase price per share that should be applied to the agreed formula for calculating the total purchase price due to him. The plaintiff through its solicitors wrote twice to Megawisra on 5 August 2013 and 16 August 2013 and Megawisra replied through its solicitors by letter dated 22 August 2013 stating that the collector of stamp duties had adjudicated the transfer of the 200,000 shares in AIMS 2 on the basis of a purchase price consideration of RM3.69 million.

[33] There is no doubt that the valuation report prepared by D1 for D3 would be relevant and necessary for the plaintiff to properly frame their claim and pursue it in a breach of contract claim against Megawisra. I agree that Megawisra is obliged to disclose the actual and true valuation of AIMS 2 to the plaintiff for him to determine the amount that is due under cls. 4(i) and 4(ii) of the sale share agreement. However, Megawisra said that they do not have the valuation report of the AIMS Group much less that of AIMS 2 and that the plaintiff is at liberty to get them from the D3 as the valuation report was not commissioned by them.

[34] Without knowing the valuation of AIMS 2 as a whole, the plaintiff would be in no position to find out the price per share of AIMS 2 and hence would not be able to calculate the purchase price due to him for the disposal of his shares in AIMS 2 to Megawisra. His claim though founded on a breach of the sale of shares contract would be lacking in material particulars with respect to the amount of balance purchase price that is due to him from Megawisra. Indeed, the plaintiff would not even be in a position to issue a letter of demand much less to reasonably and rationally negotiate for a settlement and failing which then, to proceed to file an action.

[35] Should the plaintiff proceed to claim for the payment of purchase price to be ascertained, that would be embarrassing to him and he might even suffer his claim to be struck out for being vague and lacking in material particulars. Should he then wring his arms in despair, having on the one hand a valid cause of action and on the other hand not being able to know the balance purchase price due to him and hence not being able to proceed?

[36] I do not think so. The law allows him a pre-action discovery against persons who have the valuation report of the AIMS Group. The plaintiff has his reasons to doubt the price as stated by Megawisra of RM3.69 million for the 200,000 shares of AIMS 2 as there was a meeting on or about 15 June 2011 that he averred to in his affidavit in support where Mr Afzal, a director of Megawisra, had informed him that the valuation of AIMS 2 under the acquisition by D3 was in the region of RM20 million plus. The plaintiff identified that meeting as the one in Chilli's Restaurant at the Empire Shopping Mall. Then there was a subsequent meeting with both Mr Gan and Mr Afzal where the plaintiff was informed that AIMS 2 was valued at RM4.8 million and later RM4 million.

[37] Caught in this unenviable situation where the plaintiff knows there is an amount due to him and yet at the same time not being able to know how much and hence not being able to reasonably accept or reject the sum proposed by Megawisra, in all fairness to the plaintiff, he should be allowed discovery of the valuation report of the AIMS Group as may be in the possession of the Ds. The justification becomes even more compelling when Megawisra had already, for all intents and purposes, received the full consideration bargained for from D3.

Whether The Documents Sought In The Pre-action Discovery Are Necessary In That It Would Help The Plaintiff To Assess If He Has A Viable Claim Against Megawisra And To Fill The Void And Gaps In The Plaintiff's Knowledge Of His Claim

[38] It bears repetition that O. 24 r. 8 ROC provides as follows:

> **Discovery to be ordered only if necessary** (O. 24 r. 8)
>
> 8. On the hearing of an application for an order under rule 3, 7 or 7a, the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or

> adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. (emphasis added)

[39] The Singapore equipollent provision is O. 24 r. 7 of the RC (Sing) and so cases from Singapore would be of strong persuasive authority.

[40] In *Kuah Kok Kim v. Ernst & Young* [1996] 3 SLR (R) 485 at p. 493 the Singapore Court of Appeal explained as follows:

> [31] It can be seen from the tenor of the cases that where pre-action discovery is sought, the plaintiff has a duty to set out the substance of his claim to enable a potential defendant to know what the essence of the complaint against him is. This is because in the nature of pre-action discovery, the plaintiff **does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer.** Thus the safeguards specified in the rules are to ensure that the plaintiff is not allowed to take advantage of the rules merely to enable him to go on a fishing expedition. (emphasis added)

[41] In the case of *Ching Mun Fong v. Standard Chartered Bank* [2012] 4 SLR 185 at p. 193, the Singapore Court of Appeal held:

> [23] *Thus, the scheme of pre-action discovery is to accommodate the situation where a potential plaintiff does not have sufficient facts to commence proceedings. This is consistent with its purpose being to allow a potential plaintiff to determine whether he has a "good cause of action"*. It follows that pre-action discovery is unnecessary where an individual is in a position to commence proceedings. In this regard, we think the phrase in O. 24 r. 7, "discovery is not necessary or not necessary at that stage of the cause or matter" lends weight to this approach. (emphasis added)

[42] The Court of Appeal in Singapore in *Dorsey James Michael v. World Sport Group Pte Ltd* [2014] 2 SLR 208 at p 222 compendiously culled some guiding principles to determine whether a pre-action discovery should be allowed. His Lordship VK Rajah observed as follows:

> 27. In *Kuah Kok Kim v. Ernst & Young (a firm)* [1996] 3 SLR(R) 485 ("Kuah Kok Kim"), a case on pre-action discovery, this Court explained that **its purpose is for a plaintiff who "does not yet know whether he has a viable claim against the defendant, and the rule is there to assist him in his search for the answer"**, but, significantly, this tool is also qualified with "safeguards specified in the rules … to ensure that the plaintiff is not allowed to take advantage of the rules merely to enable him to go on a fishing expedition" (at [31]). This objective was later affirmed by this Court in *Navigator Investment Services Ltd v. Acclaim Insurance Brokers Pte Ltd* [2010] 1 SLR 25 where it was stated that "the grant of pre-action discovery and/or pre-action interrogatories … **might assist the applicant to ascertain whether it had a viable claim against the respondent"** (at [63]). Additionally, these procedures may also help claimants find out who the appropriate parties to sue are or whether they will even have any cause of action against them. The utility and benefits of this procedure,

A however, must be calibrated against the fact that pre-action disclosure of any sort is quintessentially intrusive in nature - especially when it involves individuals who may ultimately not (or cannot) be parties to the litigation. **These non-parties, who may eventually be witnesses in the main proceedings, should not be unnecessarily inconvenienced, embarrassed or prejudiced by these disclosure requirements prematurely.** An application
B has to be **confined to what is strictly necessary for disposing fairly of the cause or matter** or **for saving costs in the** pending or **potential proceedings.** Deep-sea fishing must be discouraged. Most crucially, in the final analysis, the making of any order must be **"just" in all the circumstances.** (emphasis added).

C **[43]** Whilst *Dorsey James Michael*'s case (*supra*) deals with pre-action interrogatories, the Court of Appeal there had stated that the principles are the same as that of pre-action discoveries. Some of the factors and facets that may be taken into consideration in determining if an application for a pre-action discovery is necessary have been helpfully hashed out in *Dorsey*
D *James Michael*'s case [2014] 2 SLR 208 at pp. 231 to 232 as follows:

Summary of the principles

47. As such, **beyond the obvious threshold of relevance,** it is clear that **necessity (as set out in O. 26A r. 2) remains the main cornerstone** in determining whether pre-action interrogatories will be ordered: are the
E pre-action interrogatories applied for necessary for the claimant **to ascertain if his cause of action is viable?** The jurisdiction by its very nature requires the court to acknowledge that some measure of imprecision in mapping out factual contours is permissible. Yet, at the same time it must be borne in mind that **this jurisdiction cannot be overstretched to allow claimants to sniff around for potential causes of**
F **action which are still at an amorphous, undefined stage.** Nor can the procedure be employed for collateral reasons that suggest the commencement of proceedings is not the key consideration that underpins the relevant application. As much as O. 26A r. 1(3)(b) states that reference to "any pleading served or intended to be served in the proceedings" should be made only "if practicable", we would only make
G the obvious observation that the clearer the cause of action that a claimant is able to put before the court, the easier it is to ascertain the relevance and necessity of the pre-action interrogatories to those proceedings. In other words, the claimant's "real interest" (per Lord Wilberforce in British Steel at 1173F) in suing the parties on whom
H information is sought about must be made apparent to the court, and is always a highly relevant consideration.

48. Additionally, *other facets of necessity such as notions of proportionality, the availability of alternative avenues to obtain the information and how intrusive those interrogatories are would naturally be taken into consideration as well.* A significant consideration against the making of an order is that the applicant can, at
I the time of the making of the application, immediately commence proceedings against an identified party in relation to the controversy at

hand without the disclosure sought. If the applicant already has a complete cause of action against an identified party, orders should not be made with alacrity, as pre-action disclosure is then not necessary.

49. Pre-action disclosure, while not exceptional, is not usual. A court should not make an order if it has not been provided with sufficient information to adequately assess the necessity of disclosure. Reasons ought to be given why it is neither convenient nor just for that information to be sought after proceedings have been commenced against an already identifiable party. Ordinarily, the court is always placed in a better position in matters where proceedings have already commenced as it can then additionally examine the pleadings of all the parties to assess the merits of an application. This is why the granting of interrogatories after the commencement of proceedings is the norm. Further, where there are serious allegations of wrongdoing which will attract public interest considerations, a very careful assessment must be made about the appropriateness of this intrusive procedure. (emphasis added)

[44] Conversely, if a plaintiff can nevertheless craft a complete cause of action against a defendant and thus is in a position to commence the action, then a pre-action discovery would be declined. Thus in *Bayerische Hypo-Und Vereinsbank AG v. Asia Pacific Breweries (Singapore) Pte Ltd and other applications* [2004] SGHC 155 the Singapore High Court at paras. 23, 25 and 26 reasoned as follows:

[23] Can it be said in these circumstances that the banks have established a reasonable basis for their requests for pre-action discovery? It is convenient to mention Lai J's caution in *Kuah Kok Kim supra* [3] at [50]:

> [T]here must be some grounds for seeking pre-action discovery, bearing in mind that the provision should not be used for fishing expeditions, and that the normal course is to get 'ordinary discovery' after commencement of proceedings.

The applicant there obtained his own valuation report that showed a significant disparity when compared with the valuation of the respondents. With his own valuation report, the applicant was able to establish a reasonable basis for pre-action discovery.

[25] It seems to me that the banks are not constrained from starting proceedings without pre-action discovery. From their contentions *it is obvious that the banks have taken a view as to whether they have a case that APBS is responsible for the loans and whether to plead a case. It has not been said anywhere in the affidavits or in submissions by counsel that without pre-action discovery the banks are unable to plead a case.* This is unlike the case of an applicant who is unable to plead a case as he does not yet know whether he has a viable claim against the opponents, and needs pre-action discovery, and the rule is there to assist him to search for the answer: per Lai J in *Kuah Kok Kim supra* [3] at [31].

[26] It is plain that the banks simply do not believe anything that APBS has said. In my judgment, a disbelief of APBS's position itself cannot be a sufficient reason for seeking pre-action discovery. Otherwise, it will

A result in pre-action disclosure being applied for as a matter of course. That is not what the procedure is intended for. Invariably, cases that make their way to court are founded on a mutual disbelief of each other's perception of things, and a face-off is a situation common in any dispute before the commencement of proceedings. I have already pointed out in [4] that the criterion of O. 24 r. 6(3) is intended to ensure that the application for pre-
B trial action discovery is not brought frivolously or without justification. (emphasis added)

[45] It is also not the business of the court to assist the plaintiff with the gathering of evidence *via* a pre-action discovery application. What is needed to be pleaded to commence an action is to plead material facts and not
C evidence. If it is to weigh and consider evidence, then the application should come later in a pre-trial discovery application and not a pre-action discovery application. The need for a pre-action discovery must be discernedly different from that of the more common pre-trial discovery as was pointed out in the case of *Ching Mun Fong v. Standard Chartered Bank* [2012] 4 SLR
D 185 where the Singapore Court of Appeal explained and clarified as follows:

[28] … Order 24 provides for both pre-trial and the normal post commencement of action discovery. If *the object of pre-action discovery also encompasses the object of obtaining evidence to boost one's case, then it would, as pointed out in Pinsler (see [26] above), effectively render otiose the provisions for the*
E *normal discovery following the commencement of action - r 1 for general discovery following the commencement of action and r 5 for the discovery of specific documents.* The pre-and post-action discovery processes must necessarily serve different objectives. If the objectives of the two processes are the same, then there would be no reason for the Rules Committee to have provided for them under separate distinct rules.

F

[39] The appellant contemplates making claims against the Respondent in contract and/or in tort. In particular, the Appellant suggests that the Respondent had breached its contractual obligations and was negligent in failing to advise her of its intentions, the trend in gold prices and what strategies to adopt. *Since the Appellant knows what her intended causes of action*
G *are and the basis on which they are said to have arisen, the discovery of the voice-logs is not necessary to enable her to institute the intended action.*

[40] On the Appellant's declared intentions as regards the voice-logs, it is to help her assess, based on the evidence contained in the voice-logs, *whether she would be able to substantiate her assertion that the Respondent had failed to properly advise her and in turn failed in its duty to her in contract and/or in*
H *tort. In effect, the Appellant is attempting to determine whether she is likely to succeed in her causes of action, as opposed to merely enabling the formulation of her pleadings.* In this regard, we would underscore that under O. 18 r. 7, only facts and not evidence, are to be pleaded. **What the Appellant seeks relates to matters of evidence, *viz*, whether the Respondent's officers had**
I **given her proper advice.** The fact that the Respondent has denied any failure in that regard is a phenomenon which often occurs in civil litigation.

…

> [41] In these circumstances, we hold that the Judge was correct in her decision to refuse the application for pre-action discovery of the voice-logs. It seems to us that the Appellant is, at this point, on a fishing expedition. **In the normal course, the appellant would be entitled to have these discovered after the commencement of action.** (emphasis added)

[46] Thus the need for a pre-action discovery can also be viewed from the perspective of whether such a discovery would assist the applicant in assessing if he indeed has a viable claim against the defendant in an intended suit, in this case Megawisra. There is no doubt that if the letter of valuation as disclosed in D3's circular to shareholders as exhibited by the plaintiff in his affidavit-in-support contains the valuation of the AIMS Group of companies as a whole, then the full valuation report would disclose the valuation of each of the companies in the AIMS Group of which AIMS 2 is one.

[47] Having known how much is AIMS 2 valued as a whole, one would then be able to determine the price per share and apply to formula in cl. 4(ii) of the share sale agreement to determine the purchase price. If indeed, having such void and gaps filled, it is discovered that the purchase price is equivalent to the sum as valued by the collector of stamp duty in valuing the shares, then there would be no need to commence an action against Megawisra for breach of the share sale agreement but to settle with Megawisra. The saving of costs is a factor in favour of allowing a pre-action discovery even against a third party not intended to be a defendant in a suit to be commenced as provided for in O. 24 r. 8 ROC.

[48] Alternatively, the plaintiff may want to pursue other causes of action, perhaps against Afzal and Chan as well as against Megawisra for misrepresentation if what they represented to him as the purchase price had induced him to part with the whole of his shares to Megawisra eventually, only to receive very much less than what he had been represented.

Whether The Pre-action Discovery Of Documents By The Plaintiff Is Not Frivolous And Speculative And That A Mere Claim To Confidentiality Of The Documents Does Not Bar Discovery

[49] Courts in Singapore operating under the regime of their O. 24 r. 6 of the RC (Sing) which is the equipollent of our O. 24 r. 7A ROC have also referred to the test that the application should not be frivolous and speculative and that the application is not a "fishing expedition".

[50] Two cases from Singapore would be sufficient to illustrate the point. In *Bayerishe Hypo-und Vereinsbank AG v. Asia Pasific Breweries (Singapore) Pte Ltd and other applications* [2004] 4 SLR 39 at p 49 it was said:

> The criterion of the rule is intended to ensure that the application for pre-action discovery is not brought frivolously or without justification. Lai Kew Chai J, in delivering the judgment of the Court of Appeal in *Kuah*

A *Kok Kim*, [3] *supra*, at [59], said that the court's duty is to ensure that the application is **not frivolous or speculative** and that the applicant is **not on a fishing expedition.** (emphasis added)

[51] Likewise in *Ng Giok Oh and others v. Sajjad Akhtar and others* [2003] 1 SLR 375 at p 379 in graphically angling terms it was observed:

B In this case, I will reserve any comment as to whether the application is frivolous or speculative merely to avoid an unnecessary dispute over the plaintiffs' motives. That aspect can be more appropriately dealt with elsewhere; but I am bound to at least express my view that even neutrally perceived, **this application does appear to be a 'fishing expedition'.** In C view of the special circumstances and facts of this case, I would declare a **"No Fishing Zone"** until the usual discovery process can take place and the application is made again. (emphasis added)

[52] The pre-action discovery of the documents by the plaintiff so that he can assess the viability of his intended claim for the purchase price due to D him under the share sale agreement cannot be said to be frivolous and speculative. Both D1 and D3 did not state that they do not have the documents which would chiefly be the valuation report of the AIMS Group. Only D2 said that they do not have the valuation report.

[53] There is nothing private and confidential about the valuation report E prepared. Neither is it so intrusive as to be inimical to the interest of either D1 or D3 or both. In fact, being a public listed company D3 should be keen as declaring that it has nothing to hide and would do everything to help someone not paid for his shares eventhough D3 had paid for it to Megawisra. D1 being a firm of public accountant should professionally be proud of its F valuation report as being able to stand the test of scrutiny.

[54] As was observed by Lord Reid in the House of Lords in the Norwich Pharmacal's case at p. 175, when faced with a similar objection by the respondent, the Customs and Excise Commissioners:

G There is nothing secret or confidential in the information sought or in the documents which came into the hands of the respondents containing that information. Those documents are ordinary commercial documents which pass through many different hands. But it is said that those who do not wish to have their names disclosed might concoct false documents and thereby hamper the work of the Customs. That would require at least a conspiracy between the foreign consignor and the importer and it seems H to me to be in the highest degree improbable. It appears that there are already arrangements in operation by the respondents restricting the disclosure of certain matters if the importers do not wish them to be disclosed. It may be that the knowledge that a court might order discovery in certain cases would cause somewhat greater use to be made of these I arrangements.

[55] Here we are dealing with a public listed company in D3 that must of necessity comply with the Bursa LR for the acquisition exercise. Public shareholders have a right before voting in favour of the acquisition of the

whole of the AIMS Group to know how the valuation is arrived at, the basis of valuation and the projected returns and cash flow and the risk involved and finally what is a fair and reasonable price. As admitted by D1 and D3, D1 was appointed by D3 on 15 December 2010 to provide an independent valuation of the AIMS Group solely for the benefit of the non-interested members of the board of directors in D3.

[56] Here one is not dealing with a private limited company but a public company and a listed one at that. The non-interested directors are there in the board of D3 to protect the interest of the public shareholders so that they may vote intelligently, fully conscious of the independent valuation of the companies that D3 intended to acquire in the massive exercise, and for our purpose the valuation of between RM106-120 million by D1 of the AIMS Group as set out in appendix X of D3's circular to shareholders. The interested shareholders would of course have their reasons for the acquisition exercise, having always in mind, the interest of D3 as a whole.

[57] What Bursa Malaysia has put in place is a system of checks and balances where the public shareholders in D3 may be able to vote, fully conscious and satisfied that the price at which D3 intended to purchase the AIMS Group at RM119 million is a fair and reasonable price. It is therefore mandated that a firm of qualified accountant be tasked with this exercise of preparing an independent valuation for the interest of the non-interested public shareholders.

[58] The pre-action discovery of the valuation report cannot be frivolous or speculative as the document sought is the basis of an independent valuation of AIMS Group of which AIMS 2 is a part. I am quite certain if a shareholder at the EGM convened for the purpose of passing the necessary resolution for the purchase were to ask how much is the valuation for each of the company within the AIMS Group including AIMS 2 that D3 intended to purchase, the board would have to reply accordingly. Even if they do not have a reply there and then, they would be obliged to give a written reply as enjoined by the Malaysian Code on Corporate Governance 2012. Recommendation 8.1 of the Code reads:

> The board should take reasonable steps to encourage shareholder participation at general meetings.

[59] Its commentary to the above recommendation further encourages the following:

> The board should direct the company to disclose all relevant information to shareholders to enable them to exercise their rights. ...

[60] I would therefore have to dismiss the reason for objecting to the production of the documents requested on ground that the valuation report is private and confidential between D1 and D3. The very nature of the document and the very purpose for which the valuation report was prepared, which is to provide an independent valuation of the target company that D3,

A a public listed company intended to acquire, militates against any shield of secrecy and cover of confidentiality. The valuation report is prepared, every bit, for a public purpose and there is nothing private about it.

[61] Moreover disclosing it would in no way inconvenient anyone, or cause embarrassment or prejudice to D1 and D3 unless of course there are
B matters that if disclosed would cause many to be red-faced.

[62] This is certainly not a case where D1 and D3 can claim privilege where the documents sought, mainly the valuation report, were prepared by D1 as a firm of professional accountant for D3 and chiefly for consumption
C of the public shareholders. About the only privilege that may be claimed by a party against whom discovery is sought is that the document prepared is caught by solicitor-client privilege. Other professions like accountants, doctors and even priests, do not enjoy such a privilege. I would call in aid the case of *Syarikat Chin Seng Supermarket v. United Continental Insurance Sdn Bhd* [1996] 1 LNS 10; [1997] 5 MLJ 121 where an adjuster's report prepared
D to give independent advice to the insurer was not privileged from disclosure. It was held:

> The adjuster's report was outside the scope of the privilege of solicitor and client relationship. There was no evidence of confidential relationship established between the adjuster and the defendant in this case. The
E report was independent and not privileged from disclosure.

[63] Likewise in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v. Chan Kim Swi (Capital Insurance Bhd, Garnishee)* [1996] 1 LNS 112; [1997] 5 MLJ 191 it was held:

F > The report was not a communication between client and solicitor as to attract the protection of ss. 126 to 129 of the Evidence Act 1950. It was merely a report which contained evidence which were necessary to prove robbery which was the peril insured against under the policy. The report contained the details of the investigation on the alleged robbery. It was necessary to produce the report since it was compiled to determine
G whether there was any robbery and whether any payment under the policy was bound to be paid.

[64] This is a fit and proper case, where the granting of the order for discovery prayed for, though made pre-action and against third parties not intended to be a defendant in the contemplated proceedings, would be "just
H in all the circumstances" and indeed necessary for "a fair disposal of the cause or matter" as provided under O. 24 r. 8 ROC.

Whether The Discovery Order Should Be Made Against All The Defendants In The Circumstances Of The Case

I **[65]** The position of D2 would first be considered with respect to the plaintiff's application for pre-action, as unlike D1 and D3 who do not deny that they have the valuation report of the AIMS Group, D2 has denied ever having the valuation report. It is thus important to understand and appreciate

the position of D2 in this whole acquisition exercise. D2 was appointed by D3 as the independent adviser to the non-interested directors and non-interested shareholders of D3 for the proposed acquisitions by D3 which included the acquisition of all the shares of AIMS 2 from Megawisra. D2 was also appointed as the independent adviser to the shareholders of D3 for the proposed capital repayment and the proposed capital restructuring.

[66] It was in this context that D2 prepared and issued an Independent Advice Circular to the non-interested shareholders of D3 dated 25 October 2011 ("IAC"). I agree with learned counsel for D2, Mr Samuel Tan, that the scope of D2's review as an independent adviser is to review the basis and assumptions adopted by D1 in arriving at the valuation of the acquiree companies and to determine whether the purchase consideration of the acquiree companies is fair. See pp. 148 to 160 of exh. AZM-3 of the plaintiff's affidavit, vol. 1 at para. 3 which states as follows:

> In exercising the value provided by PwC Capital, we have considered the basis and assumptions which have been adopted by PwC Capital. In addition to such basis and assumptions, we have also considered the discount factors adopted as well as the key underlying assumptions and market comparables.

[67] In the circular to the shareholders at p. 48 of exh. AZM-3 of the plaintiff's affidavit, vol. 1, it was D1 that was appointed by D3 to provide an independent valuation of, *inter alia*, the AIMS Group. D2 was not so appointed and so would not ordinarily have the valuation report.

[68] This is further borne out by the documents exhibited by the plaintiff himself at p. 131 of the IAC at exh. AZM-3 of the plaintiff's affidavit, vol. 1 at cl. 5(ii) where it is patently plain that D2 did not independently conduct a valuation of the acquiree companies (including the AIMS Group). D2 is referred to by its acronym "PIVB" in the IAC. It is a public document available to all and sundry to read. Clause 5(ii) reads:

> PIVB's views and advice as contained in this IAC to the non-interested shareholders of TdC in relation to the Proposed Acquisitions, has taken into account the valuation of the equity value of the Acquiree Companies appraised by an independent valuer, PwC Capital. **As such, we have not independently conducted a valuation of the Acquiree Companies.** (emphasis added)

[69] There is thus no good reason for me to disbelieve D2 when in its affidavit D2 states that it does not have in its possession or did not at any time come into possession of the valuation report prepared for the acquisition and/or the valuation report for each entity under the AIMS Group. I would thus dismiss the plaintiff's claim for a pre-action discovery for the valuation report from D2.

[70] As a corollary, the ancillary reliefs of discovery of supporting documents and working papers in respect of the acquisition must also fail. I cannot agree more with D2's submission that the demand to inspect the

working papers in such a wide and general manner is irrelevant and not necessary as D2's evaluation and method of evaluation as to whether D1's valuation is of fair value are clearly set out in the circular and IAC at pp. 148 to 173 of exh. AZM 3 of the plaintiff's affidavit vol. 1. The *dicta* of the High Court in *Bayerische Hypo-Und Vereinsbank AG* (*supra*) bears repetition:

> [38] The Court is, by O. 24 r. 7, concerned with the discretion to refuse disclosure of a document unless the necessity for disclosure is clearly demonstrated. In a way, it calls for an exercise in considering and selecting documents or some parts of them. *The wider the range of documents requested the more difficult it is for the court to decide whether the documents are necessary for "disposing fairly" of the matter or cause before proceedings are commenced or for "saving costs".* As necessity for disclosure was not demonstrated in the present case (the banks having concentrated on the relevancy of the documents), the applications cannot be upheld. (emphasis added)

[71] I now turn my attention to D1 and D3 where both did not deny having the valuation report of AIMS 2. It is only too obvious that in preparing the independent valuation letter dated 21 October 2011 and which letter is included in the circular to the shareholders prepared by the merchant banker, CIMB Merchant Bank Bhd, both D1 and D3 would have the valuation report of AIM 2, it being one of the companies in the proposed acquisition.

[72] There is no necessity of ordering both D1 and D3 to produce the said valuation report for inspection and for copies to be taken. It would involve additional and unnecessary costs for the same result. As between D1 and D3, I had made an order against D3, being the company that has the closest nexus to the plaintiff for it was the plaintiff who had been persuaded to transfer his shares in AIMS 2 to Megawisra which in turn flogged it off to D3. As the discovery at this stage would not prejudice D3, which has the document sought to be discovered, and which being a public listed company, has nothing to hide with respect to a fair price for which D3 had paid for the purchase of the whole of Megawisra shares in AIMS 2, I had granted an order in terms of the application only against D3 for the discovery of the valuation report prepared for the acquisition, including without limitation, the valuation of each entity under the AIMS Group, in particular AIMS 2.

[73] As for the need to refer to the supporting documents and working papers of D1, that would not be necessary at this stage and at the appropriate time after commencing the plaintiff's action, the plaintiff may subpoena D1 if necessary or even go for discovery against D1 if the valuation report alone is insufficient for the plaintiff to formulate and prove their claim against Megawisra.

Pronouncement

[74] As such, I had dismissed the claim of the plaintiff against D1 and D2. As for costs the plaintiff is to pay D1 the sum of RM3,500. D2 was easy on costs and not pushing or prevailing for any amount and in the circumstance the court ordered the plaintiff to pay D2 the sum of RM1,000 as costs.

[75] As the requirements of O. 24 r. 7A ROC have been satisfied, I had ordered that D3 do furnish a copy of the valuation report within 14 days from the date of this order.

[76] As for costs with respect to the party against whom discovery is ordered, regard is to be had to O. 24 r. 7A(9) ROC, where that party shall be "entitled to his costs of the application, and of complying with any order made thereon on an indemnity basis". Therefore, the plaintiff shall pay D3 the sum of RM4,000 to cover the costs of this application and the costs and expenses to be incurred to furnish the plaintiff with the valuation report.